UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADAM MICHAEL MOORE, Plaintiff, v. SEAN DUMAS, *et al.*, Defendants.	CASE NO. C10-512-RSM REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff is a Washington prisoner who is currently incarcerated at the Washington State Penitentiary. He brings this action under 42 U.S.C. § 1983 to allege violations of his constitutional rights during two periods of confinement in the King County Department of Adult and Juvenile Detention ("KCDAJD") between April 2007 and July 2010. Specifically, plaintiff alleges that he was physically and verbally abused by corrections officers, that he was denied medications necessary for treatment of his mental health issues, and that he was confined in isolation units for long periods of time. Plaintiff identifies the following seven

employees of the KCDAJD as defendants in this action: Sean Dumas; Vicki Shumaker; Nancy Light; David Vestal; Jesse Rollolazo; Bernie Dennehy; and, Ward Weaver. Plaintiff seeks injunctive relief and damages.

Defendants now move for summary judgment. Plaintiff has filed a response to defendants' motion and defendants have filed a reply brief which contains within it a motion to strike plaintiff's response on the grounds that the response was not timely filed. The Court, having reviewed defendants' motions, and the balance of the record, denies defendants' motion to strike plaintiff's response and recommends that defendants' motion for summary judgment be granted.

BACKGROUND

The claims asserted by plaintiff in his amended civil rights complaint arise out of two separate periods of incarceration in the KCDAJD. Plaintiff's first period of incarceration began on April 19, 2007, when he was booked into the King County Regional Justice Center ("RJC") in Kent on multiple outstanding warrants for probation violations. (*See* Dkt. No. 28 at 2 and Dkt. No. 30 at 2.) Plaintiff was subsequently transferred to the King County Correctional Facility ("KCCF") in Seattle where he remained until his release on May 30, 2009.[1] (*See id.*) During this period of incarceration, plaintiff had 15 infractions for violating institution rules. (*See* Dkt. No. 28 at 2 and Dkt. No. 30 at 2.) Plaintiff was classified as ultra

1 Defendants assert in their motion papers that plaintiff was transferred from the RJC to KCCF on April 21, 2007. (*See* Dkt. No. 28 at 2 and Dkt. No. 30 at 2.) However, documents submitted in support of defendants' summary judgment motion make clear that plaintiff was still confined at the RJC for much of May 2007, and that he was not transferred to KCCF until approximately May 24, 2007. (*See* Dkt. No. 29, Ex. 1 and Dkt. No. 31, Ex. 1.) Defendants' documents are consistent with plaintiff's assertion in his amended complaint that the first of two alleged incidents of excessive force occurred at the RJC in May 2007. (Dkt. No. 10 at 5.)

security and was housed in administrative segregation during the majority of his incarceration as a result of his violent behavior, problems with other inmates, and abusive comments and actions towards staff. (*See id*.)

During this first period of incarceration, plaintiff was involved in two incidents which give rise to the excessive force claims asserted in the amended complaint. The first incident occurred at the RJC in May 2007 and involved defendant Vestal. (*See* Dkt. No. 10 at 5-7.) The second incident occurred at KCCF in February 2008 and involved defendant Weaver. (*Id*. at 8-10.) These two incidents will be discussed in greater detail below.

Plaintiff's second period of incarceration began on July 11, 2009, when he was again booked into KCCF. (*See* Dkt. No. 30 at 2.) Plaintiff remained at KCCF until July 16, 2010 when he was transferred into the custody of the Washington Department of Corrections. (*See id*.) When plaintiff was booked into KCCF in July 2009, he was classified as ultra security and was housed in administrative segregation. (*Id*.) Plaintiff remained in administrative segregation for a majority of this second period of incarceration as well. (*Id*.)

During this second period of incarceration at KCCF, plaintiff complained to jail staff about not being given proper medications to treat his mental health issues and about being housed in administrative segregation and protective custody. (*See* Dkt. No. 10 at 4.) The failure of staff to resolve those complaints in plaintiff's favor gives rise to the claims asserted against defendants Dumas, Shumaker, Dennehy, Rollolazo, and Light. (*See id*.)

Plaintiff initially filed this civil rights action in March 2010 while he was still confined at KCCF. (*See* Dkt. No. 1.) Because of deficiencies in plaintiff's original complaint, the Court declined to serve the complaint, but granted plaintiff an opportunity to amend. (Dkt. No.

7.) Plaintiff filed his amended complaint on June 3, 2010, and that complaint was subsequently served on defendants. (Dkt. Nos. 10 and 14.) Defendants thereafter filed a timely answer to the amended complaint and the Court established a pretrial scheduled which included a discovery deadline of December 17, 2010, and a dispositive motion filing deadline of January 18, 2011. (Dkt. Nos. 25 and 26.)

Defendants filed the pending motion for summary judgment on January 14, 2011, and that motion was noted on the Court's calendar for consideration on February 11, 2011. (*See* Dkt. No. 28.) On February 14, 2011, the Court received a document from plaintiff entitled "Motion to Dismiss Summary Judgment under Rule 56(f)," which the Court construes as plaintiff's response to defendants' summary judgment motion. (*See* Dkt. No. 33.) On March 4, 2011, defendants filed a reply brief in support of their motion for summary judgment and included therein a motion to strike plaintiff's untimely response. (*See* Dkt. No. 34.) The Court deems the briefing in this matter complete and will proceed to consideration of the pending motions.

DISCUSSION

Defendants' Motion to Strike

The first matter that must be taken up by the Court is defendants' motion to strike plaintiff's response to their pending motion for summary judgment. Defendants argue that the response should be stricken because it was not timely filed. (*See* Dkt. No. 34.) The record reflects that the response was, in fact, untimely as it was not mailed to the Court until the day before the noting date and it was not received by the Court until after the noting date had passed. (*See* Dkt. No. 33.) The record also reflects that plaintiff failed to provide proof that he served

his motion on counsel for defendants as required by Local Rule CR 7(b)(1). While this Court does not condone plaintiff's failure to comply with the court's well established rules governing motion practice, the Court deems it important to address the request set forth in plaintiff's response that defendants' summary judgment motion be denied under Fed. R. Civ. P. 56(f). The Court therefore accepts the response for filing.[2]

Rule 56(f) permits the Court to deny or continue a motion for summary judgment where "a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition." While plaintiff contends in his response that he cannot get declarations from witnesses, he also concedes that "it will be very hard if not impossible" to do so. (Dkt. No. 33 at 6.) Plaintiff does not explain what efforts, if any, he has made to secure witness statements thus far. Moreover, nothing in the record suggests that plaintiff made any effort to conduct discovery in this matter during the discovery period. For these reasons, this Court deems it appropriate to proceed to consideration of defendants' summary judgment motion.

Summary Judgment Standard

Summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

2 The Court also notes that defendants have not been prejudiced by plaintiff's untimely response. The response contains no legal arguments or evidence and, in any event, defendants became aware of the response in sufficient time to file a reply brief.

242, 257 (1986). Genuine disputes are those for which the evidence is such that a "reasonable jury could return a verdict for the nonmoving party." *Id*. Material facts are those which might affect the outcome of the suit under governing law. *Id*.

In response to a properly supported summary judgment motion, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e). A mere scintilla of evidence is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252. In ruling on a motion for summary judgment, the court is required to draw all inferences in a light most favorable to the non-moving party. *Id*. at 248.

Section 1983 Standard

In order to sustain a cause of action under 42 U.S.C. §1983, a plaintiff must show (i) that he suffered a violation of rights protected by the Constitution or created by federal statute, and (ii) that the violation was proximately caused by a person acting under color of state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The causation requirement of § 1983 is satisfied only if a plaintiff demonstrates that a defendant did an affirmative act, participated in another's affirmative act, or omitted to perform an act which he was legally required to do that caused the deprivation complained of. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981) (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)).

Excessive Force

Plaintiff alleges in his amended complaint that he was physically and verbally abused by corrections officers during his first period of incarceration. Plaintiff identifies two specific

incidents of alleges abuse in his amended complaint, one involving Corrections officer David Vestal in May 2007 and one involving Corrections officer Ward Weaver in February 2008.

The United States Supreme Court has made clear that "the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment." *Graham v. Connor*, 490 U.S. 386, 395 n. 10 (1989). The Ninth Circuit has determined that "the Fourth Amendment sets the 'applicable constitutional limitations' for considering claims of excessive force during pretrial detention." *Gibson v. County of Washoe*, 290 F.3d 1175, 1197 (9th Cir. 2002) (citing *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir. 1996)). Thus, plaintiff's claim of excessive force must be evaluated under the Fourth Amendment's objective reasonableness standard. *Pierce*, 76 F.3d at 1043.

In *Graham*, the Supreme Court explained that determining whether a particular use of force was "reasonable" under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (internal quotations omitted). Among the factors that must be considered in evaluating a claim of excessive force are "whether the suspect poses an immediate threat to the safety of the officers or others," and "whether he is actively resisting." *Graham*, 490 at 396. *See also Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912 (9th Cir. 2001). The Supreme Court made clear in *Graham* that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396.

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1. Corrections Officer David Vestal

Plaintiff asserts in his amended complaint that defendant Vestal, together with other unnamed officers, abused their power, and physically injured plaintiff, when they dragged him across the floor backwards while escorting him from one RJC unit to another in May 2007. (Dkt. No. 10 at 5-6.) As plaintiff describes the incident, defendant Vestal, at some point during the escort, directed plaintiff to get on his knees, with his back to officers, and to put his hands behind his back to be handcuffed. (*Id*. at 5.) According to plaintiff, once defendant Vestal applied handcuffs, he and another officer began dragging plaintiff across the floor, pulling on his arms while his legs were still bent at the knees. (*Id*.)

Plaintiff contends that being dragged in this fashion caused extreme pain to his wrists and lower back, and that after being dragged like this for over a hundred feet, he "instinctively" bit defendant Vestal to make him stop. (*Id*.) Plaintiff further contends that defendant Vestal and the other officer then put him on the ground where he was pepper sprayed and his neck was "crushed" by an unknown officer's knee. (*Id*.) Plaintiff acknowledges that he was charged with custodial assault as a result of this incident, but maintains that he was essentially acting in self-defense and that the incident could have been avoided if defendant Vestal had followed standard transfer procedures instead of dragging plaintiff across the floor. (*Id*. at 6.)

Defendants argue in their summary judgment motion that defendant Vestal did not use excessive force against plaintiff at any time during plaintiff's incarceration. The Certification for Determination of Probable Cause filed in King County Superior Court in support of the custodial assault charge, and submitted by defendants in support of their summary judgment motion, offers a more comprehensive view of the incident in question. (Dkt. No. 29, Ex. 1.)

The certification states that on the evening of May 24, 2007, plaintiff, who was then confined in R-Unit at the RJC, was causing a disturbance in his cell by throwing his chair against the wall and the window. (Dkt. No. 29, Ex. 1.) Plaintiff's behavior was reported to Sergeant Katherine Jones who ordered all available officers to meet her in R-Unit. (*Id*.) Six officers, including defendant Vestal, responded. (*Id*.) When officers reached plaintiff's cell, Sergeant Jones ordered plaintiff to back up to the door and sit on his knees so that he could be handcuffed. (*Id*.) Plaintiff called Sergeant Jones a "fat bitch" and refused to comply with her order. (*Id*.) Sergeant Jones then repeated her order and plaintiff asked what would happen if he didn't comply. (*Id*.) Sergeant Jones advised plaintiff that she would assemble an extraction team and forcibly remove him from the cell. (*Id*.) Plaintiff eventually complied with the order and was handcuffed. (*Id*.)

As officers walked plaintiff toward the door of R-Unit, plaintiff began resisting and he called defendant Vestal a "nigger." (*Id*.) Sergeant Jones then ordered officers to turn plaintiff around and escort him so that he was walking backwards. (*Id*.) The certification notes that, for safety reasons, this is a standard procedure employed with non-compliant offenders. (*Id*.) Plaintiff refused to walk and one of the officers therefore had to carry plaintiff's legs. (*Id*.) When the group reached the R-Unit sally port, plaintiff began thrashing, spitting and kicking at officers. (*Id*.) Defendant Vestal yelled that plaintiff was biting him at which point three of the officers, including defendant Vestal, used counter-joint and straight-arm bar techniques to take plaintiff to the ground. (*Id*.) Once on the ground, plaintiff continued to resist and Sergeant Jones administered pepper spray. (*Id*.) Officers eventually got plaintiff standing again, but then had to carry him to the administrative segregation unit. (*Id*.)

Following the incident, defendant Vestal was treated at the Valley Medical Center for a bite wound to his right forearm. (Dkt. No. 29, Ex. 1.) Approximately two months later, plaintiff entered a guilty plea to the charge of custodial assault for his assault on defendant Vestal. (*Id*., Ex. 2.) Plaintiff was subsequently sentenced to a term of four months confinement for that offense. (*Id*., Ex. 3.)

Plaintiff, in his response to defendants' motion, asserts that defendant Vestal's representation that he resisted and therefore had to be escorted backwards constitutes perjury as plaintiff claims he never resisted before being dragged across the floor. (Dkt. No. 33 at 2.) Plaintiff also reiterates his claim that he bit defendant Vestal in self-defense. (*Id*. at 3.) However, plaintiff offers no evidence to support his version of events.

The evidence in the record demonstrates that defendant Vestal was one of several officers involved in escorting plaintiff on May 24, and that the escorting officers exerted some force in response to plaintiff's apparent efforts to resist. (*See* Dkt. No. 29, Ex. 1.) There is no evidence in the record to support plaintiff's claim that he was dragged across the floor nor is there any evidence that plaintiff suffered any injury as a result of officers' attempts to gain his compliance. Moreover, there is no evidence to suggest that defendant Vestal himself employed any force which could be considered excessive in the circumstances presented here. Defendants are therefore entitled to summary judgment with respect to the excessive force claim asserted against defendant Vestal.

2. Corrections Officer Ward Weaver

Plaintiff also asserts in his amended complaint that on February 12, 2008, defendant Weaver slammed him to the floor while he was in handcuffs, verbally threatened him, and

sexually harassed him. The incident in question occurred while KCCF officers, including defendant Weaver, were transporting plaintiff to the psychiatric ward on the seventh floor of of the facility. (Dkt. No. 10 at 8.)

As plaintiff describes the incident, he was returning from court, wearing a leg restraint which had been specifically applied for trial, when the restraint locked up at the knee making it difficult for plaintiff to walk. (*Id*. at 9.) Plaintiff contends that the transporting officers pushed him faster than he could walk and pushed his head down so that he was unable to stand up straight while he walked. (*Id*.) Plaintiff asserts that the officers' actions caused pain to his lower back and to his right thigh. (*Id*.)

According to plaintiff, once they arrived at the seventh floor psychiatric unit, where all inmates are required to remove their socks and underwear, he told the transporting officers that he could remove his underwear by himself, but the officers told him they thought he needed help and then slammed him face down on the ground, put their knees on his neck and back, and held his feet while they removed his clothes. (*Id*. at 9-10.) Plaintiff contends that during this process, officers also made threats of violence and made comments of a sexual nature. (*Id*.)

Defendants argue in their motion for summary judgment that defendant Weaver did not use excessive force against plaintiff at any time. Defendants have submitted in support of their motion for summary judgment the declaration of defendant Weaver and a copy of the report he prepared regarding the incident in question on the day the incident occurred. (Dkt. No. 32.)

According to defendant Weaver, he had two interactions with plaintiff on the day the incident in question occurred. (Dkt. No. 32 at 2.) At approximately 11:20 a.m., plaintiff was discovered reaching his arms out of a holding cell after having taken apart a rolling chair that

his attorney had previously been sitting in. (Dkt. No. 32, Ex. 1.) Plaintiff had dismantled the top of the chair from its base and had pushed both pieces away from the cell, but claimed ignorance when he was asked for the missing parts. (*Id*.) Plaintiff was handcuffed by defendant Weaver and a pat search was conducted. (*Id*.) Plaintiff was verbally abusive to officers during this process. (*Id*.) Officers subsequently discovered the missing metal chair parts had been thrown behind the holding cell. (*Id*.)

Less than an hour later, defendant Weaver was assigned to escort plaintiff back to the jail. (*Id*. at 2 and Ex. 1.) During the escort, plaintiff directed racial insults at defendant Weaver and the other escorting officer. (*Id*.) Plaintiff informed officers that he would kill them if they took him to the psychiatric floor and that he would cut their throats. (Dkt. No. 32 at 2 and Ex. 1.) Plaintiff also claimed that he would kill defendant Weaver's entire family. (*Id*.)

While in the elevator from the intake area of KCCF to the seventh floor, plaintiff became resistive. (*Id*.) Defendant Weaver responded to this resistance by raising plaintiff's arms above his shoulders to counter plaintiff's attempts to gain leverage. (*Id*.) The escort then continued to the 7 North Unit with an additional three officers present. (*Id*.) Defendant Weaver states that plaintiff did not offer any further resistance and that plaintiff was taken out of his restraints after being placed in his cell. (Dkt. No. 32 at 2.) Defendant Weaver further states that his only physical contact with plaintiff was when he handcuffed plaintiff after plaintiff had dismantled the chair while in the holding cell, and when he raised plaintiff's arms above his head after plaintiff became resistive in the elevator during the escort to the seventh floor. (*Id*.)

Plaintiff, in his response to defendants' motion, asserts that defendant Weaver's assertion that he had no physical contact with plaintiff except for handcuffing him and raising his hands above his head constitutes perjury. (Dkt. No. 33 at 4-5.) Plaintiff contends that defendant Weaver slammed his head against the wall during the morning pat search and that defendant Weaver later subjected him to a forced strip search. (*Id*.) Once again, however, plaintiff offers no evidence to support his version of events. There is no evidence in the record that plaintiff suffered any injury as a result of the actions of defendant Weaver or any of the escorting officers. The record is also devoid of any evidence establishing that defendant Weaver was, in fact, the officer involved in the alleged forceful removal of plaintiff's clothes once he arrived on the seventh floor. Accordingly, defendants are entitled to summary judgment with respect to the excessive force claim asserted against defendant.

Plaintiff also complains that defendant Weaver issued verbal threats and made sexual comments to him during the February 12, 2008 escort. (*See* Dkt. No. 10 at 8-10.) However, the Ninth Circuit has held that verbal harassment or abuse is not sufficient to state a claim under § 1983. *Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997) (citing *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987). Thus, to the extent plaintiff claims that his constitutional rights were violated by defendant Weavers' alleged verbal harassment or abuse, those claims must be dismissed.

Medical Care

Plaintiff asserts in his amended complaint that he was denied necessary medications to treat his mental health issues. This claim arises out of a January 2010 medical grievance he filed concerning the Jail's failure to give him medications that had previously been prescribed

for him at Western State Hospital. (Dkt. No. 10 at 4.) Plaintiff contends that defendant Dumas responded to this grievance "with indifference" when he told plaintiff that he would only get a single medication. (*Id*.) Plaintiff further contends that the failure to provide him with the necessary medications caused him to go through withdrawal, to stay awake for five days straight, and to hallucinate. (*Id*.)

Because plaintiff was apparently a pretrial detainee at the time his claims arose, any claim of inadequate medical care arises under the Due Process Clause of the Fourteenth Amendment and not under the Eighth Amendment prohibition against cruel and unusual punishment. *Carnell v. Grimm*, 74 F.3d 977, 979 (9th Cir. 1996). However, the Ninth Circuit has made clear that, with respect to medical needs, "the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes: 'persons in custody ha[ve] the established right to not have officials remain deliberately indifferent to their serious medical needs.'" *Gibson v. County of Washoe*, 290 F.3d 1175, 1187 (9th Cir. 2002) (citing *Carnell*, 74 F.3d at 979.)

A medical need is deemed serious if the failure to treat the condition could result in further significant injury or the "unnecessary and wanton infliction of pain." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). In order to establish deliberate indifference, a plaintiff must show a purposeful act or failure to act on the part of prison officials. *Id*. at 1060.

Defendants argue in their motion for summary judgment that plaintiff's claim of inadequate medical care against defendant Dumas is without merit as there is no evidence that defendant Dumas was deliberately indifferent to plaintiff's serious medical needs. Defendants

are correct.

The record reflects that on January 5, 2010, plaintiff submitted a medical grievance to KCCF Jail Health Services asking that he be given Vistaril and Trazodone which had been prescribed for him at Western State Hospital. (*See* Dkt. No. 10 at 18.) Defendant Dumas responded to that grievance, advising that the only medication which had been renewed from plaintiff's stay at Western State was Buspar.[3] (Dkt. No. 10 at 18.) When plaintiff appealed this response, asserting that doctors at Western State told him he would get additional medications in jail, he was advised by someone other than defendant Dumas that he would need to fill out a release of information form for Western State Hospital in order for KCCF Jail Health Services to review those records. (*Id*.) There is no indication in the record that plaintiff pursued this issue further with KCCF staff.

Plaintiff asserts in his response to defendants' motion that defendant Dumas did not take plaintiff's requests for medications seriously and that he suffered mentally as a result. (Dkt. No. 33.) Plaintiff, however, offers no evidence to support his assertions. While plaintiff was clearly dissatisfied with the medications he was provided by the medical staff at KCCF, the controversy here appears to amount to nothing more than a difference of opinion as to what treatment was appropriate for plaintiff's mental health issues. It is well established that differing opinions on medical treatment do not amount to a violation under the Eighth Amendment. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996) (citing *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989)).

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3 There is no indication on the grievance, or anywhere else in the record before this Court, who was responsible for making decisions regarding the medications plaintiff was to receive while at KCCF.

Plaintiff offers no evidence that the course of treatment chosen by KCCF medical staff was medically unacceptable or that decisions regarding his treatment were made in conscious disregard of an excessive risk to plaintiff's health. Plaintiff therefore fails to establish a violation of his Eighth Amendment rights. *See Jackson*, 90 F.3d at 332. Accordingly, defendants are entitled to summary judgment with respect to plaintiff's claim that defendants failed to provide him necessary medical care.

Classification

Plaintiff asserts in his amended complaint that he was confined in isolation units for long periods of time and was denied opportunities to return to general population. (*See* Dkt. No. 10 at 4.) Plaintiff contends that his lengthy periods of isolation were harmful to his mental health. (*Id*.) Plaintiff attributes his lengthy stays in isolation to defendants Vicki Shumaker, Bernie Dennehy, Jesse Rollolazo, and Nancy Light who he claims either caused him to be placed in isolation or denied his grievances seeking release from isolation. (*See id*.)

When a pre-trial detainee challenges some aspect of his pretrial detention that is not alleged to violate any express guarantee of the Constitution, the issue to be decided is the detainee's right to be free from punishment. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979). Such challenges arise under the Fourteenth Amendment Due Process Clause. *Id*. at 535. While the Due Process Clause protects pretrial detainees from punishment, not every disability imposed during pretrial detention constitutes "punishment" in the constitutional sense. *Id*. at 537.

The test for identifying unconstitutional punishment at the pretrial stage of a criminal proceeding requires a court to examine "whether there was an express intent to punish, or 'whether an alternative purpose to which [the restriction] may rationally be connected is

assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Demery v. Arpaio*, 378 F.3d 1020, 1028 (9th Cir. 2004) (quoting *Bell*, 441 U.S. at 538). "For a particular governmental action to constitute punishment, (1) that action must cause the detainee to suffer some harm or 'disability,' and (2) the purpose of the governmental action must be to punish the detainee." *Demery*, 378 F.3d at 1029. Further, "to constitute punishment, the harm or disability caused by the government's action must either significantly exceed, or be independent of, the inherent discomforts of confinement." *Id*. at 1030.

The Supreme Court has recognized that "maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell v. Wolfish*, 441 U.S. at 546. The Supreme Court has further recognized that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Id*. at 547. Plaintiff's claims regarding his retention in the isolated housing units are properly analyzed under the standard announced in *Bell*.

Plaintiff asserts that he spent over two years confined in a solitary cell while in the KCDAJD. (*See* Dkt. No. 10 at 11.) However, all of the alleged improper classification actions referenced in the amended complaint occurred in 2010 during plaintiff's second period of confinement in KCCF. (*See* Dkt. No. 10 at 11.) According to defendant Dennehy, who submitted a declaration in support of defendants' summary judgment motion, when an inmate is booked into the KCDAJD, he begins with the same housing classification he had when he was

last released. (Dkt. No. 30 at 2.) Thus, plaintiff, who spent a majority of his prior incarceration in the KCDAJD classified as an ultra security inmate and housed in administrative segregation, received the same classification and housing assignment when he was booked back into KCCF in July 2009, less than two months after his previous release. (Dkt. No. 30 at 2.)

On February 4, 2010, plaintiff filed a grievance in which he complained about the amount of time he had spent in isolation and about the deficiencies in the treatment he was receiving for his mental health issues. (Dkt. No. 10 at 13.) Defendant Shumaker responded to plaintiff's grievance, advising him that he would need to address his concerns regarding mental health treatment to the jail medical staff and that his administrative segregation placement was the result of his failure to follow jail rules and behavior expectations while housed in the general population. (*Id.*) Plaintiff appealed this response and defendant Dennehy denied the appeal, advising plaintiff that his classification status would not change because of his history of uncooperative behavior and assaults on staff which made him a risk to the safety and security of the institution. (*Id.*)

On April 14, 2010, defendant Rollolazo determined that plaintiff needed to be placed in protective custody because of media coverage which identified him as having allegedly engaged in satanic and anti-Semitic acts which involved defacing area churches. (*See* Dkt. No. 30, Ex. 2.) On April 26, 2010, defendant Light responded to a kite from plaintiff requesting that he be allowed to return to general population. (*See* Dkt. No. 30, Ex. 2.) At that time, defendant Light apparently indicated to plaintiff that because of extensive notes in his record regarding his difficulties in general population, a review for early release from administrative

segregation was not warranted. (*Id*.)

On May 8, 2010, plaintiff filed a grievance in which he complained that defendant Rollolazo had placed him in protective custody against his will and that he needed to be given stronger medication to address his mental health issues. (Dkt. No. 10 at 16.) Plaintiff also indicated in his grievance that he had complained to defendant Light, though the grievance does not make clear the precise nature of those complaints. (*See id*.)

Defendant Shumaker responded to plaintiff's grievance advising, once again, that plaintiff would need to address his concerns regarding his medical issues to the jail health staff via kite or through the medical grievance process. (*Id*. at 17.) She further advised plaintiff that his classification issue was moot because he was no longer in protective custody. (*Id*.) Plaintiff appealed this response as it pertained to the issue of protective custody. (*Id*.) Defendant Dennehy denied the appeal, advising plaintiff that he had been placed in protective custody for his own protection because he then had seven "keep separates" which put him at risk. (*Id*.) Defendant Dennehy further advised plaintiff that he would remain in isolation because of inappropriate behavior towards staff and comments made to other inmates. (*Id*.)

Defendants argue in their motion for summary judgment that they did not violate plaintiff's constitutional rights by keeping him housed in administrative segregation or, for a short time, in protective custody because plaintiff's own behavior warranted the placements. Plaintiff, in his response to defendants' motion, suggests that his placements in protective custody and administrative segregation were unnecessary and unwarranted and that they only made his mental health worse. (Dkt. No. 33 at 6-7.) Plaintiff, however, offers no evidence that the placements were intended as punishment and, in fact, the evidence in the record

suggests the contrary. The evidence demonstrates that plaintiff was placed in administrative segregation in response to behavioral issues and that he was placed in protective custody for his own protection. Accordingly, defendants are entitled to summary judgment with respect to plaintiff's classification claims.

CONCLUSION

For the reasons set forth above, this Court recommends that defendants' motion for summary judgment be granted and that plaintiff's amended complaint, and this action, be dismissed with prejudice. A proposed Order accompanies this Report and Recommendation.

DATED this 4th day of April, 2011.

Mary Alice Theiler
United States Magistrate Judge